

<b>Addressing</b>	
<b>From</b>	<b>To</b>
"Smith, Justin (ENRD-LPS Attorney)" <JuSmith@ENRD.USDOJ.GOV>	Laurie Kermish/R9/USEPA/US@EPA
<b>CC</b>	<b>BCC</b>
"Duncan, Katherine (ENRD)" <KDuncan@ENRD.USDOJ.GOV> "Leopold, Matt (ENRD)" <MLEopold@ENRD.USDOJ.GOV>	
<b>Description</b> <span style="float: right;">Form Used: Memo</span>	
<b>Subject</b>	<b>Date/Time</b>
FW: Northern California River Watch v. Union Pacific Railroad Company	12/07/2009 01:10 PM
<b># of Attachments</b>	<b>Total Bytes</b>
0	46,047
<b>NPM</b>	<b>Contributor</b>
	Kimberly Wells
<b>Processing</b>	
<b>Comments</b>	

Body

### Document Body

FYI, an email exchange with Mr. Silver on this case.

Attorney-Client

Attorney-Client

Attorney-Client

Attorney-Client

J

**From:** Smith, Justin (ENRD-LPS Attorney)  
**Sent:** Monday, December 07, 2009 4:09 PM  
**To:** 'Jack Silver'  
**Cc:** Jerry Bernhaut; Lisa Mador  
**Subject:** RE: Northern California River Watch v. Union Pacific Railroad Company

Jack --

Thanks for the additional background. We will give this settlement a quick look as I mentioned.

I'm not sure of the ins and outs of this particular point source issue -- my recollection is that there may be some real complexities with groundwater though for a number of reasons.

Justin

**From:** Jack Silver [mailto:warrioreco@yahoo.com]  
**Sent:** Friday, December 04, 2009 1:42 PM  
**To:** Smith, Justin (ENRD-LPS Attorney)  
**Cc:** Jerry Bernhaut; Lisa Mador  
**Subject:** Re: Northern California River Watch v. Union Pacific Railroad Company

Justin,

Just to give you a bit of a back ground, this site was used for a number of industrial purposes including scrap metal recycling. Most of the operations ceased in the late 70's. High amounts of solvents and heavy metals remain at the site today - nearly 30 years later. Near by drinking wells have also been contaminated. We filed a RCRA action based upon the ground water contamination and a CWA action based upon our concern that surface waters may be affected due to transient levels of solvents found in surface waters near the site. The court dismissed the CWA claims based upon plaintiff's failure to identify a point source other than the plume itself.

I believe we could have corrected that defect and refiled the CWA claims but we discovered that the source of the solvents in the surface water were from a former dry cleaner and not the UPR site due to and examination of the solvent type (PCE vs TCE). Furthermore, the RCRA claims provided us with sufficient leverage to gain the kind of relief we were able to achieve in this case.

So no CWA claims remained pending after the Court acted, and no CWA claims were subsequently asserted due to the evidence of non-surface water involvement.

With regard to appealing the Court's dismissal . . my client fully believes that contaminated ground water that ends up polluting waters of the U.S. should be able to be prosecuted under the CWA. I think the way around the perceived CWA Notice defect is to identify the original point sources similar how they are described in the deep ripping or manure spreading cases. Nonetheless I believe a plume is a point source and see little difference between a LUST site

with or without the tank remaining in the ground. However, we are waiting for the right case (and Judge) to push that issue. Has DOJ ever rendered an opinion on this issue?

Thanks again for your feed back.

Regards ~ Jack

**From:** "Smith, Justin (ENRD-LPS Attorney)" <Justin.Smith@usdoj.gov>  
**To:** Jack Silver <warrioreco@yahoo.com>  
**Cc:** "Duncan, Katherine (ENRD)" <Katherine.Duncan@usdoj.gov>  
**Sent:** Fri, December 4, 2009 7:28:42 AM  
**Subject:** RE: Northern California River Watch v. Union Pacific Railroad Company

Jack --

Our review of the complaint in this case indicates that there was originally a CWA claim in this matter.

It appears (based on Ms. Duncan's research in response to your message) that the Court subsequently dismissed the CWA claim. Can you confirm that (1) no CWA claims remained pending after the Court acted, and (2) that no CWA claims were subsequently asserted (via amended complaint, etc)?

In theory, your client would retain a right to appeal the Court's decision dismissing the CWA count. The description of claims resolved operates to resolve that right of appeal. So there is a CWA claim that is resolved by this CD. I think 33 U.S.C. 1365 does provide for DOJ review of a CD in that situation. But I would add that, if the only CWA claim has been dismissed and all that remains is a right of review, that would be an important consideration in our analysis of the relief provided in the CD.

I wanted to get your thoughts on that. Glad to chat on the phone if that is easier -- let me know how you would like to proceed. (And I am not trying to be a nuisance here, just trying to complete our review process in a fair and efficient way.)

Thanks.

Justin

**From:** Jack Silver [mailto:warrioreco@yahoo.com]  
**Sent:** Tuesday, December 01, 2009 4:49 PM  
**To:** Duncan, Katherine (ENRD); mljohns1@up.com; mbhagan@up.com;  
rcbylsma@up.com; beam@smlaw.com; kirk@smlaw.com; hkershell@gordonrees.com;  
mpietrykowski@gordonrees.com; mboone@gordonrees.com  
**Cc:** Smith, Justin (ENRD-LPS Attorney); Lisa Mador; Jerry Bernhaut  
**Subject:** Re: Northern California River Watch v. Union Pacific Railroad Company

Dear Ms. Duncan:

This case did not involve the Clean Water Act. This was a RCRA case exclusively. Therefore the references regarding review by DOJ are inapplicable.

If you have any questions please feel free to contact me.

Regards ~ Jack Silver  
Attorney for NCRW

**From:** "Duncan, Katherine (ENRD)" <Katherine.Duncan@usdoj.gov>  
**To:** warrioreco@yahoo.com; jbernhaut@comcast.net; mljohns1@up.com; mbhagan@up.com;  
rcbylsma@up.com; beam@smlaw.com; kirk@smlaw.com; hkershell@gordonrees.com;  
mpietrykowski@gordonrees.com; mboone@gordonrees.com  
**Cc:** "Smith, Justin (ENRD-LPS Attorney)" <Justin.Smith@usdoj.gov>  
**Sent:** Tue, December 1, 2009 1:26:38 PM  
**Subject:** Northern California River Watch v. Union Pacific Railroad Company

Counsel –

The Department of Justice has received the proposed consent judgment in the above-captioned case. The reviewing attorney assigned to this matter is Justin Smith, who is cc'ed on this email and may be reached at 202-514-0750 or Justin.Smith@usdoj.gov.

Under Section 505(c)(3) of the Clean Water Act, 33 U.S.C. 1251 et seq., and 40 C.F.R. 135.5(b), the United States has 45 days from receipt of a proposed consent judgment by the DOJ Citizen

Suit Coordinator (on behalf of the Attorney General) and EPA to complete the federal review and provide any comments to the court. In this case, the DOJ Citizen Suit Coordinator received the proposed consent judgment on [date]. **We have determined that the 45 day review and comment period ends on December 28, 2009.**

*1. DOJ's End Date Calculation Is Presumptively Binding.* We believe that our determination of DOJ's date of receipt is authoritative. Occasionally, a party will arrive at a different calculation of the due date for comments. To eliminate uncertainty as to the due date at the time the US is submitting its comments (and to avoid associated waste of judicial resources), we ask that you raise any such concerns without delay. Questions or concerns regarding the due date for comments can generally be resolved quickly and amicably if they are discussed at the beginning of the review period with the DOJ reviewing attorney. Thus, if you have concerns about the due date, please raise them within seven days of receipt of this email. We will otherwise notify the Court at the time of filing that you have agreed with our determination of the end date.

*2. Communicating End Date To the Court.* 40 C.F.R. 135.5(b) requires that the plaintiff notify the Court of the statutory requirement that the consent judgment shall not be entered prior to 45 days following the receipt by DOJ and EPA. Plaintiff must further notify the Court of the date on which the Attorney General and the Administrator received copies of the proposed consent judgment in the case at hand. It is important to comply timely with these obligations. The above paragraph hereby notifies you of the date of receipt by the DOJ Citizen Suit Coordinator. If counsel has previously communicated a due date to the Court that is different from the date calculated by DOJ, please notify us and the Court immediately. Also, if you believe there is a risk of premature entry by the Court, please let us know so that we may notify the Court that we are in the process of reviewing the consent judgment. These steps will help ensure compliance with Section 505 of the Clean Water Act and avoid potential questions of validity arising from premature entry of a proposed consent judgment in violation of that section. Finally, please be aware that future revisions to the version you have submitted for review may restart the 45 day review period. (We may, however, choose to waive such subsequent review on request.)

The proposed consent judgment has been distributed internally for review. We will contact you if we have any questions or comments. If there are any features of this proposed consent judgment that you would like to discuss, we welcome your comments or thoughts. Prior to the end of the 45 day period, the United States intends to notify the Court of any United States objections or comments.

Katherine Duncan

Citizen Suit Paralegal

Environment and Natural Resources Division

U.S. Department of Justice

(202) 514-0424

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